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No. 06-1082

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

DAVID LEE MOORE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

The Virginia statute underlying this case is modeled directly on ABA Pretrial Release Standard 10-2.2, which requires citation and release rather than arrest for minor offenses, absent grounds that reasonably support danger or a likelihood of non-appearance. *See* American Bar Association, *Criminal Justice Standards, Pretrial Release* (ABA 3d ed. 2007), at 65–66, App. 5–6 (Standard 10-2.2). The ABA therefore submits this *amicus* brief to address the following question:

Whether it is unreasonable to arrest a person when there is probable cause to believe that a minor offense has been committed, but state law prohibits an arrest for that offense unless there are circumstances that would reasonably support arrest (such as danger or likelihood of non-appearance)?

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INTEREST OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, *amicus curiae* American Bar Association ("ABA") respectfully submits this brief in support of the position that a statutory requirement of citation and release, rather than arrest, for minor offenses, represents a realistic and balanced policy that is consonant with the longstanding consensus view of the ABA and many state and local jurisdictions. The ABA Pretrial Release Standards setting forth this policy have—for four decades—represented reasonable standards upon which this Court may rely in addressing the constitutional question.

The American Bar Association ("ABA") is the world's largest voluntary professional membership organization, and the leading association of legal professionals in the United States. The ABA's membership of over 413,000 attorneys spans all 50 States and other jurisdictions, and encompasses lawyers from every aspect of the profession, including prosecutors, public defenders, private attorneys, legislators and academicians. The ABA also receives participation from judges, law enforcement and correc-

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

tions personnel, and law students, as "associate" members.[2]

The ABA has long been dedicated to promoting a fair and balanced system of justice, including criminal justice. Its mission is to serve the public and the profession by promoting justice, professional excellence, and respect for the law. Among the ABA's Goals are "to promote improvements in the American system of justice" and "to provide ongoing leadership in improving the law to serve the changing needs of society."[3]

The ABA devotes substantial resources and energy from its members and associates to develop policies that speak to current legal issues. It approves such policies only after significant study, discussion, and review. Drafts of ABA policies routinely go through many revisions, over many months, to reflect the presentation of views from all segments of the ABA's diverse membership. Further, before adoption, the ABA circulates its draft policies widely among the public and other groups that may have a special interest in the subject, and obtains active participation on its Task Forces from such outside

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[2] However, neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] American Bar Association, *ABA Policy and Procedures Handbook, 2007–2008*, at 1 (Goals I & III); http://www.abanet.org/about/goals.html.

organizations (for example, from the U.S. Department of Justice and the National Association of District Attorneys, among others, for criminal law policies).

One of the most prominent efforts of the ABA toward law reform has been its Criminal Justice Standards project. Begun in 1964, under the aegis of then-ABA President (and later Justice) Lewis F. Powell, Jr., the Criminal Justice Standards project has promulgated 20 different topical sets of Standards, over four decades, in every area of criminal justice. As this Court recently recognized, "We long have referred to these ABA Standards as guides to determining what is reasonable." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) and *Strickland v. Washington*, 466 U.S. 668 (1984)) (internal punctuation and quotation marks omitted). Chief Justice Burger wrote in 1974, upon the issuance of the first full edition of the Standards, that "[t]he Standards are a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251–252 (1974).

The ABA's Criminal Justice Standards have been influential in every branch and at every level of American law enforcement and government. They have frequently been referred to, and adopted, by courts, legislatures, and executive branch law enforcement agencies. Computer database searches reveal that the Standards have been cited by courts

in every State and federal Circuit in the United States. The Criminal Justice Standards may currently be found in law libraries across the country and on the ABA website at www.abanet.org/crimjust/standards/home.html.

Forty years ago, the ABA published Pretrial Release Standards that support policies of citation and release, rather than arrest, for most minor offenses, unless factors are present that reasonably indicate danger or a likelihood of non-appearance. *See* American Bar Association, *Standards Relating to Pretrial Release* (ABA 1968) (hereinafter "*1968 Pretrial Release Standards*"). The ABA has adhered to these Standards through three substantive reviews and re-adoptions. *See* American Bar Association, *Criminal Justice Standards, Pretrial Release* (ABA 3d ed. 2007) (hereinafter "*2007 Pretrial Release Standards*"), at 63–70, App. 1–13 (Standards 10-2.1 to 10-2.4). These Standards and their Commentary are reproduced in full in the Appendix to this brief, and are also presented in Section I(B), *infra*. The ABA Standards endorsing citation and release rather than full custody arrest, for most minor offenses, represent a realistic and balanced approach to criminal law enforcement that has proven effective over time. The ABA's review of these Standards have confirmed that they are reasonable, both in theory and in the practical experience of the many jurisdictions that have adopted these standards.

Many state and local jurisdictions have followed the ABA's lead in this area. *See* Brief *Amici Curiae* of Texas *et al.*, at 24–26 & n.6 ("many jurisdictions have chosen to limit warrantless misdemeanor ar-

rests"); Debra Whitcomb *et al.*, *Citation Release* (Nat'l Institute of Justice, U.S. Dep't of Justice, Washington, D.C. 1984), at 3 (reporting that, by 1981, all but nine states had adopted some form of citation and release statutes, and that such procedures were in use in at least 45 states).

The Virginia statute that is at issue in this case—requiring citation and release, rather than arrest, for minor offenses—was a direct legislative response to the ABA's 1968 Pretrial Release Standards, in particular Standard 10-2.2. *See* Richard E. Walck *et al.*, *Comparative Analysis of American Bar Association Standards for Criminal Justice with Virginia Laws Rules and Legal Practice* (undated [1974]), at II-3 ("Virginia should consider amending its Code to provide for the issuance of citations in conformity with the [ABA] standard[s]" 2.1 and 2.2). Virginia's statute is in accord with the current ABA Standards as well as those of many other states, and the ABA has an interest in supporting those jurisdictions that have adopted ABA Standards and sought to enforce them. The ABA likewise has an interest in having this Court consider its Pretrial Release Standards in determining what is reasonable in the Fourth Amendment context of this case.

SUMMARY OF ARGUMENT

The ABA Standards on Pretrial Release recommend that States adopt statutes that favor citation and release, rather than arrest, for minor offenses, unless additional factors suggesting danger or a likelihood of non-appearance are present. *2007 Pretrial Release Standards* at 65–66, App. 5–6 (Standard 10-2.2). These Standards have been studied, refined,

and formally adopted by the ABA on four different occasions over the past forty years. They have influenced the statutes and rules adopted in the vast majority of American jurisdictions, including Virginia, that favor citation and release for minor offenses. *See generally* Whitcomb, *Citation Release*, *supra*. Thus the ABA Standards represent a realistic, balanced, and reasonable policy—a consensus view adopted by a wide range of thinkers and law enforcement interests over time—and they have proven to be effective in the field.

This Court has, in other cases, relied on the ABA Standards to determine what is reasonable. *E.g.*, *Rompilla*, *supra*, 545 U.S. at 387 (Sixth Amendment); *Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (citing the Standards and Commentary to evaluate arrest authority). In particular, because the state courts here found no facts to reasonably suggest that an arrest was necessary for this minor offense, and Virginia state law prohibited the arrest, the ABA Standards counsel that the arrest was unreasonable. Moreover, the Commentary to ABA Standard 10-2.4 recognizes that when no reasonable grounds for arrest are present, then "once a citation is issued the police officer has no authority to search unless a basis other than incident to arrest is apparent (e.g., plain view)." *2007 Pretrial Release Standards*, Commentary to Standard 10-2.4, at 70 n.31, App. 13 n.31. Thus the search here, conducted pursuant to an unreasonable arrest, was also unreasonable. The ABA respectfully submits that this Court should consider the consensus views expressed in the Pretrial Release Standards to determine that the Virginia statute reflects a reasonable rule in the

Fourth Amendment context, and for that reason, affirm the judgment of the Virginia Supreme Court.

ARGUMENT

I. The American Bar Association Standards for Pretrial Release, Advocating Citation Rather Than Arrest for Most Minor Offenses, Represent a Realistic, Balanced, and Reasonable Policy.

A. The ABA Criminal Justice Standards Are Developed and Adopted Through a Process That Ensures a Realistic and Balanced Policy Reflecting the Reasonable Consensus of the Law Enforcement Community.

The ABA's Pretrial Release Standards are the tenth chapter in the ABA's overall Criminal Justice Standards project. *See* American Bar Association, *Criminal Justice Section Standards Homepage*, www.abanet.org/crimjust/standards/home.html (linking to all 20 of the ABA's Criminal Justice Standards sets). The Standards represent the consensus views of a wide diversity of legal interests. The final Standards, adopted after many months of study and review, present balanced and realistic guidance regarding reasonable law enforcement practices, toward the ultimate goal of providing an effective yet fair criminal justice system in American society. As explained in the Introduction to the Prosecution Function and Defense Function Standards, the Standards are:

> the result of careful drafting and meticulous and extensive review by representatives of all segments of the criminal Justice system: judges, prosecutors, private defense counsel, public defenders, court personnel, and academics active in criminal justice teaching and research. Circulation of the standards to a number of individuals with a wide range of outside expertise in criminal justice has also assured the consideration of a rich array of comment and criticism that has greatly strengthened the quality of the final product.

American Bar Association, *Standards for Criminal Justice, Prosecution Function and Defense Function* (ABA 3d ed. 1993), at xii.

In 2006, the Chair of the ABA Criminal Justice Standards Committee further described the careful and balanced process by which the Standards are developed. Irwin Schwarz, "Introduction to Criminal Justice Standards," in *The State of Criminal Justice 2006* (ABA 2007), at 69–70:

> The Standards are a valued criminal justice asset largely because of the process through which they are created. Each set of Standards is developed through three levels of drafting and review before it reaches the House of Delegates for final approval as ABA policy. At each of the three levels—Task Force, Standards Committee, and Criminal Justice Section Council—the draft Standards are refined by ABA members who represent the views of the criminal justice community—prosecutors, defense lawyers, judges

> and academicians. The Task Forces, the Standards Committee and the CJS Council are numerically balanced in their composition, by design, to assure that all sectors of the criminal justice community are represented in the process. In addition, each of those entities receives input from liaisons from professional associations such as the National Association of Attorneys General, the National Association of District Attorneys, the National Association of Criminal Defense Lawyers, and the National Legal Aid and Defender Association. Development and approval of a set of Standards may require three to six years.

Thus the Criminal Justice Standards, once they are finally adopted by the ABA, represent the careful study and considered thinking of a wide range of legal and law enforcement interests over a significant period of time. They are revised to address the concerns of law enforcement. They strike a reasonable balance between effective law enforcement and the rights of all Americans.

The ABA Standards on Pretrial Release were first promulgated in 1968. *See 1968 Pretrial Release Standards.* A second edition was adopted by the ABA after full reconsideration in 1979, and a Supplemental Edition was adopted, again after careful review, in 1985. *See* American Bar Association, *Standards for Criminal Justice, Pretrial Release* (ABA 2d ed. 1980), at Chapter 10; American Bar Association, *Standards for Criminal Justice, Pretrial Release* (ABA 2d ed. Supp. 1986), at Chapter 10. The

current, third edition of the Pretrial Release Standards was adopted by the ABA, again after a complete review, in 2002, and was then published with Commentary in 2007. *See 2007 Pretrial Release Standards.*

Thus the ABA has studied, reviewed, and adopted Standards on Pretrial Release on four different occasions over the past four decades. Throughout that period, Standard 2.2, recommending citation and release rather than arrest, absent additional factors indicating danger or likelihood of non-appearance, has remained the consistent policy of the ABA. Over time, many jurisdictions have adopted citation and release statutes and rules based on the ABA model. *See* Whitcomb, *Citation Release*, *supra*, at 3 ("As of 1981, all but nine states" had adopted statutes or rules for citation and release; "the procedure is now in use in 45 states"). These procedures have proven to be fair, effective, and cost-efficient over time. *Id.* at vii (reporting one study showing cost savings of almost 100% by the use of field citations rather than arrest). Thus the ABA's reasonable, consensus Standards here have had widespread influence and proven effective in the jurisdictions that have adopted them.

B. The ABA Standards on Pretrial Release Reasonably Require Citation and Release for Most Minor Offenses, Absent Factors Indicating Danger or Likelihood of Non-Appearance.

Before presenting the rationale for the ABA's citation and release Standards (*see infra*, section I(C)),

amicus presents and summarizes the text of the relevant Standards and Commentary here. The full text of Standards 10-2.1 to 10-2.4 is reprinted in the Appendix to this Brief.

First, the ABA Standards on Pretrial Release state a general policy favoring release over detention, pretrial, when consistent with public safety and ensuring that offenders will reappear for the judicial process. Needless detention is disfavored, because it is "harsh and oppressive" as well as expensive for law enforcement:

> **Standard 10-1.1**
> **Purposes of pretrial release decision**
>
> The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses, and the community from threats, danger, or interference. . . . The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardships, interferes with their ability to defend themselves, and, in many instances, deprives their families of support . . . .

Part II of the Pretrial Release Standards then addresses "Release by Law Enforcement Officer Acting Without an Arrest Warrant." This Part begins by recommending generally that States adopt stat-

utes that favor citation over arrest for minor offenses:

> **Standard 10-2.1**
> **Policy favoring issuance of citations**
>
> It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.

In particular, when a person is stopped for a minor offense, the Standards recommend that release be required once a citation has been issued, unless facts that reasonably suggest danger or a likelihood of non-appearance are present. App. 5. Specific factors that would permit arrest even for minor offenses are laid out, including whenever "necessary to ensure the safety of any person or the community." Standard 10-2.2(c), App. 5–6. This is the Standard that Virginia adopted in the statute that the Virginia Supreme Court found was violated here:

> **Standard 10-2.2**
> **Mandatory issuance of citation for minor offenses**
>
> (a) Except as provided in paragraph (c), a police officer who has grounds to arrest a person for a minor offense should be required to issue a citation in lieu of taking the accused to the police station or to court.

. . .

(c) The defendant may be detained when an otherwise lawful arrest or detention is necessary to ensure the safety of any person or the community, or when the accused:

(i) is subject to lawful arrest and fails to identify himself or herself satisfactorily;

(ii) refuses to sign the citation after the officer explains to the accused that the citation does not constitute an admission of guilt and represents only the accused's promise to appear;

(iii) has no ties to the jurisdiction reasonably sufficient to ensure the accused's appearance in court and there is a substantial likelihood that the accused will refuse to respond to a citation;

(iv) previously has failed to appear in response to a citation, summons, or other legal process for an offense;

(v) is not in compliance with release conditions in another case, is subject to a court order or is on probation or parole; or

(vi) poses a substantial likelihood of continuing the criminal conduct if not arrested.

Standard 10-2.3 then encourages law enforcement agencies to promulgate regulations "to increase the use of citations to the greatest degree consistent

with public safety." App. 11. As the U.S. Department of Justice reported in Whitcomb *et al.*, *Citation Release*, *supra*, at 3, "the procedure is now in use in 45 states."

Finally, Standard 10-2.4 addresses "Lawful Searches," to make clear that if an officer makes a "lawful arrest" of an offender, and then decides to cite and release the offender, the subsequent release on citation "should not affect the lawfulness" of any prior search conducted incident to that lawful arrest. App. 12. However, as the Commentary to Standard 10-2.4 notes, "once a citation is issued the police officer has no authority to search unless a basis other than incident to arrest is apparent." App. 13 n.31.

> **Standard 10-2-4**
> **Lawful Searches**
>
> When an officer makes a lawful arrest, the defendant's subsequent release on citation should not affect the lawfulness of any search incident to the arrest.
>
> **Commentary**
>
> The Fourth Amendment to the United States Constitution permits the police to perform warrantless searches of defendants incident to lawful arrest. [n. 31]
>
> n.31: . . . once a citation is issued the police officer has no authority to search unless a basis other than incident to arrest is apparent (e.g., plain view). *See* Knowles v. Iowa, 525 U.S. 113 (1998) . . . .

C. The Rationale for the ABA's "Citation and Release" Standards, Pretrial Release Standards 10-2.1 to 10-2.4, Reflects a Realistic, Balanced, and Reasonable View.

The overarching rationale for the ABA's citation and release Standards is clear: when there are no factors present that reasonably counsel arrest (danger or a likelihood of non-appearance), then it is cost-effective for law enforcement agencies, as well as significantly more protective of individual privacy and liberty, to cite and release a minor offender rather than engage full-blown custodial arrangements. Arresting a minor offender, when no factors that reasonably counsel arrest are present, is simply unreasonable.

As the ABA noted in 1968 when it first promulgated Standards on Pretrial Release, "[t]he public . . . suffers when defendants are unnecessarily detained." *1968 Pretrial Release Standards*, at 3. Not only is needless expense incurred by government agencies when effectuating, processing, and maintaining custody, but individual liberty is unnecessarily sacrificed. *Id.*; *accord 2007 Pretrial Release Standards*, at 64, App. 3. Police agencies cannot realistically afford to take into custody all persons whom they have probable cause to believe have violated the law. Nor should persons who present no apparent danger nor risk of non-appearance be subjected to the disruptive and intrusive accoutrements that accompany a full-custody arrest and processing. In general, criminal offenses that are adjudged to be minor, as defined by the legislative branch that a democracy entrusts to

write the criminal laws, do not normally present events that reasonably require full custodial detention and processing after the citation process is complete.

Thus the diverse ABA membership, which includes many prosecutors as well as law enforcement personnel, has stated its balanced view: absent reasonable ground for further detention, probable cause to believe a defendant has violated a minor criminal law is not reasonably sufficient to justify further detention after the defendant has cooperated with the citation process.[4]

As the drafters of the ABA Standards recognized, however, any "citation and release" policy must sensibly balance the rationale for release against the serious needs of criminal law enforcement and the judicial system. Thus Standard 10-2.2 provides a number of reasonable exceptions to the policy of citation and release. The Commentary recognizes that "a bright-line rule prohibiting arrests for minor offenses is not appropriate." *2007 Pretrial Release*

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[4] The most detailed explication of the citation and release Standards' rationale appears in the Commentary to the Second Edition of the Pretrial Release Standards, *supra*, at 10-22 to 10-29. "[A]rrest ought not to be the automatic response to every criminal law violation. When arrest serves no legitimate purpose, police ought to be authorized—and in clear cases required—to utilize the less restrictive alternative of citation release." American Bar Association, *Standards for Criminal Justice, Pretrial Release* (ABA 2d ed. 1980) at 10-22. This Commentary also details that the ABA's policy here "is consistent with most other national standards," including that of the National Association of District Attorneys, the NAC, and the American Law Institute. *Id.*

Standards at 67, App. 9. Thus Standard 10-2.2(c) provides that even minor offense defendants "may be detained when an otherwise lawful arrest or detention is necessary to ensure the safety of any person or the community . . . ." App. 5. In addition to this safety exception, the Standard permits arrest when the accused fails to identify him or herself or otherwise refuses to cooperate; has no ties to the jurisdiction; has previously failed to appear on a citation; is already subject to some other lawful restraint (court order, probation or parole); or is likely to continue the criminal conduct. *2007 Pretrial Release Standards*, Standards 2.2(c)(i) to (vi), App. 5–6.

As the Commentary to Standard 10-2.2(c) explains, these exceptions allow for "permissive" arrest discretion in the individual officer on the scene, while attempting to limit the "broad discretion" of officers that can sometimes result in harassment or discriminatory enforcement. *2007 Pretrial Release Standards* at 67, App. 9–10; *see, e.g.*, *Chicago v. Morales*, 527 U.S. 41, 65–66 (1999) (O'Connor, J., concurring with Breyer, J.) (noting need for specificity "to prevent 'arbitrary and discriminatory enforcement' of the law") (citation omitted). Absent reasonable grounds to arrest, the ABA's Standards reasonably circumscribe an officer's arrest authority.

D. Many Jurisdictions (Including Virginia) Have Adopted Citation and Release Policies, and Their Continued Use Reflects Their Reasonableness in Practical Operation.

The balanced reasonableness of the ABA's Pretrial Release Standards is demonstrated by the many

jurisdictions that have adopted some form of "citation and release" policy for minor offenses since 1968. The ABA is not aware of any current published source that gathers all such authorities—which is perhaps unsurprising because such provisions are not uniformly worded (making electronic database searching difficult), and are often scattered among dozens if not hundreds of minor criminal violation statutes rather than in a general statutory section as Virginia has chosen. Nevertheless, over 20 years ago the U.S. Department of Justice's National Institute of Justice reported that "all but nine States" had adopted such policies, and that citation and release procedures were in use in at least 45 States. Whitcomb *et al.*, *Citation Release*, *supra*, at 3. Similarly, in this case, the *Amici* Brief filed by Texas's prosecutors and other States, supporting the petitioner, notes that "many jurisdictions have chosen to limit warrantless misdemeanor arrests." Brief *Amici Curiae* of Texas *et al.*, at 24–26 & n.6 (providing examples).[5] The ABA's own recent research reveals the statutes cited in the following footnote from at least 26 jurisdictions (24 States plus the District of Columbia and Guam), that express "citation and release" statutory requirements for some minor of-

[5] It is significant that this *Amici* Brief in support of the Petitioner, as well as the Brief of Petitioner in this case, is filed by the chief prosecution authority in the listed jurisdictions, and not the legislative authorities of those jurisdictions. Presumably the legislatures of jurisdictions that have adopted and retained citation and release statutes and rules would defend those policies as reasonable.

fenses.[6] *Amicus* has no doubt that there are many, many more such policies in place across the country.

This Court has noted that the "ultimate touchstone" for Fourth Amendment analysis is "reasonableness." *United States v. Knights*, 534 U.S. 112, 118 (2001). The reasonableness requirement appears in that Amendment separate and apart from a requirement of probable cause.[7] The ABA respect-

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[6] "Mandatory" release (with exceptions): Alabama (Code of Ala. § 2-2-14.1 (2007)); California (Cal. Veh. Code §§ 23222(b); 40500; Cal. Pen. Code § 836.5 (2007)); Colorado (Colo. Rev. Stat. §§ 18-18-406(2), 42-4-1707 (2007)); Iowa (Iowa Code § 805.16(1) (2006)); Kentucky (Ky. Rev. Stat. Ann. § 22-2408 (2007)); Minnesota (Minn. R. Crim. P. 6.01(1)(a) (2005)); Nebraska (R.R.S. Neb. §§ 29-422, 60-684 (2007)); New Mexico (N.M. Stat. Ann. §§ 31-1-6, 66-8-123(A) (2007)); Ohio (Ohio Rev. Code Ann. § 2935.26(A) (2007)); Pennsylvania (Pa. R. Crim. P. § 519(B)(1) (2007)); South Dakota (S.D. Codified Laws § 32-33-2 (2007)); Tennessee (Tenn. Code Ann. § 55-10-207(a)(1) (2007)); Texas (Tex. Penal Code § 49.031(e) (2007)); Vermont (V.R. Cr. P. Rule 3 (2007)); and Virginia (Va. Code Ann. § 19.2-74 (2007)). Permissive release: Alaska (Alaska Stat. § 12.25.180 (2007)); Arkansas (Ark. R. Crim. P. Rule 5.2); District of Columbia (D.C. Code § 23-1110 (2007)); Florida (Fla. R. Crim. P. 3.125 (2007)); Guam (8 Guam Code Ann. § 25.10 (2007)); Hawaii (Haw. Rev. Stat. Ann. § 803-6 (2007)); Kansas (Kan. Stat. Ann. § 22-2408 (2006)); Louisiana (La. Code Crim. P. Art. 211 (2007)); Nevada (Nev. Rev. Stat. Ann. § 171.1773 (2007)); and Utah (Utah Code Ann. § 77-7-18 (2007)).

[7] The Fourth Amendment, applicable to the States via the Due Process Clause of the Fourteenth Amendment, provides that "The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated, and no warrant shall issue, but upon **probable cause**, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV (empha-

fully submits that its citation and release Standards, developed by experienced lawyers, judges, and law enforcement personnel with a wide range of interests and experience, and consistently adhered to through three re-adoptions over four decades, represent a realistic, balanced, and reasonable policy. The Standards balance the legitimate needs, and scarce resources, of law enforcement, together with the legitimate concerns of individuals stopped for minor offenses who present no danger to others or of non-appearance. The fact that many jurisdictions have adopted citation and release policies further supports the ABA's submission. *Amicus* respectfully urges this Court to consider these policies as it evaluates the constitutional issues in this case.

II. As Applied to This Case, the ABA's Pretrial Release Standards Support the Conclusion of the Virginia Supreme Court That the Unlawful Arrest, and Subsequent Search, by Virginia Authorities Were Unreasonable.

In this case, the Virginia Supreme Court unanimously ruled that an arrest for the misdemeanor of driving with a suspended license violated a Virginia statute that requires, in the absence of circumstances that reasonably require further detention, citation and release rather than arrest. *Moore v. Virginia*, 636 S.E.2d 395, 396 & n.3, 399–400 (2006) (citing Virginia Code § 19.2-74(A)(1) ("when a police officer detains a person for a Class I misdemeanor,

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sis added). Indeed, by the Amendment's terms, "probable cause" refers only to warrants.

the officer 'shall . . . issue a summons . . . .'"). The Virginia Court affirmed the *en banc* Virginia Court of Appeals' determination that "the record is devoid of evidence" to support an exception to the statute. 636 S.E.2d at 396 n.3. Because Moore's full-custody arrest violated the Virginia statute, the Virginia Supreme Court ruled that there could be no "lawful[ ] . . . search incident to an arrest." *Id.* at 399–400.

This Virginia "citation and release" statute, adopted in 1974, was based directly on the ABA's Pretrial Release Standards as first promulgated in 1968. Those Standards expressly advocated that States and local jurisdictions adopt its recommended citation and release structure. *See 1968 Pretrial Release Standards,* Standard 2.2(a) ("Legislative or court rules should be adopted which enumerate the minor offenses for which citations should be issued."). The second and third editions of the Standards further emphasized this policy of state statutory adoption. *See 2007 Pretrial Release Standards*, Standard 10-2.1, App. 1 ("It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.")

Virginia (like many other States after the initial publication of the ABA Standards) conducted a "comparative analysis" of its State laws and practice *vis a vis* the ABA Standards, and recommended that "Virginia should consider amending its Code to provide for the issuance of citations in conformity with the [ABA] standard." Walck *et al.*, *Comparative*

Analysis, supra, at II-3 (regarding Pretrial Release Standards 2.1 and 2.2). The Virginia statute at issue in this case was the direct legislative product of that effort, and specifically of ABA Pretrial Release Standards 2.1 and 2.2.

The ABA's Pretrial Release Standards, if applied to the facts of this case, support two conclusions.

First, the arrest was unreasonable because, as the Virginia Supreme Court concluded, there were no facts reasonably suggesting that custody, beyond the detention needed to issue a citation, was necessary. The Virginia statute is consistent with the consensus view expressed in ABA Pretrial Release Standard 10-2.2(a), which requires a citation rather than arrest for minor offenses. The Virginia Supreme Court unanimously affirmed the Court of Appeals' finding that no facts suggesting an exception were present (again, directly equivalent to ABA Standard 10-2.2(c)). Thus the arrest was inconsistent with the consensus view of diverse law enforcement interests, as adopted in many jurisdictions and as expressed in the Virginia statute as well as the ABA's Standard 10-2.2.

Second, ABA Pretrial Release Standard 10-2.4 reflects a further broad consensus that a "lawful" arrest is required to conduct a search incident to arrest. Here, the arrest was unlawful under Virginia state law—a citation should have been issued, followed by release. The search incident to that arrest therefore violated the reasonable policy expressed in Pretrial Release Standard 10-2.4. The Commentary to Standard 10-2.4 makes clear that "once a citation is issued the police officer has no authority to search

unless a basis other than incident to arrest is apparent." *2007 Pretrial Release Standards* at 70 n.31, App. 13 n.31.[8] Absent such a standard, the risk of costly, inefficient, invasive and potentially pretextual searches is an unreasonable one. Officers could use unlawful arrests, or the citation process alone, to conduct otherwise improper searches. Such a practice would be inconsistent with the widespread, reasonable consensus policies expressed in the ABA Standards (as well as with this Court's recent decision in *Knowles v. Iowa*, 525 U.S. 113 (1998) (Fourth Amendment does not permit search "incident to citation")). There was no "lawful arrest" or "other basis" advanced by the Virginia officers in this case to support the search of respondent's person. On the facts of this case, application of the ABA Standards—which reflect decades of analysis, broad input from many criminal justice sectors, and the actual experience of many U.S. jurisdictions—confirms that the arrest in violation of state law, and the subsequent search, were unreasonable.

Consistently for almost four decades, the ABA has advocated a policy of "citation and release" for minor criminal offenses. Many jurisdictions have now adopted such policies. In light of the reasonable and balanced rationale, and widespread influence, of the ABA's Pretrial Release Standards, *amicus* requests that this Court take them into account when evaluating the Virginia Supreme Court's decision in this case. On the facts presented, the respondent's

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[8] In *Castle Rock, supra*, this Court expressly relied on the Commentary to the Criminal Justice Standards in evaluating the arrest policies at issue. 545 U.S. at 760–761.

unlawful arrest, and any search incident to that arrest, were unreasonable under the balanced, consensus views of the ABA Standards.

CONCLUSION

For the reasons set forth above, and consistent with its commitment to promoting improvements in the American system of justice, the ABA respectively submits that the Court should affirm the decision of the Virginia Supreme Court.

Respectfully submitted,

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APPENDIX

Excerpt from
American Bar Association,
Criminal Justice Standards,
***Pretrial Release* (ABA 3d ed. 2007)**

PART II

RELEASE BY LAW ENFORCEMENT OFFICER ACTING WITHOUT AN ARREST WARRANT

Standard 10-2.1
Policy favoring issuance of citations

It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.

History of the Standard

This Standard is unchanged.

Related Standards

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2007), 10-1.3
ALI, Model Code of Pre-Arraignment Procedure (1975), 120.2; 120.4; 130.3
NAC, Corrections (1973), 4.3
NAC, Courts (1973), 4.2
NCCUSL, Uniform Rules of Criminal Procedure (1987), 211; 221

NDAA, National Prosecution Standards (1991), 45.2

Commentary

In the historical context of the 1960's, the First Edition's recommendation that law enforcement agencies issue citations rather than make arrests whenever possible represented a fairly dramatic new direction in arrest practices.[25] However,

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[25] For historical background concerning arrests for minor offenses, *see* Wayne LaFave, *Arrest* (1965); Arthur L. Beeley, *The Bail System in Chicago*, *supra* note 17 at 154; Warner, "The Uniform Arrest Act", 28 Virginia Law Review 315, 346 (1942). By the late 1980's, many states had passed legislation relating to police arrest powers for minor offenses, but the majority retained the broad discretion of police officers to arrest, even for traffic offenses. *See* Barbara C. Salken, "The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses", 62 Temp. L. Rev 221, 249-50 and notes.187-192 (1989) (collecting statutory and rule authority and finding that 28 states had no limitations on police discretion to arrest for traffic offenses and that of 22 states with limitations, many retain broad discretion or only "require the issuance of a citation in a small class of offenses."). As of the first decade of the twenty-first century, it appears that a significant number of states require or at least encourage the use of citations for traffic and other minor offenses. Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. Lago Vista*, 71 Fordham L. Rev. 329, 414 n. 497 (2002). The issue has received renewed interest in the wake of the Supreme Court decision in *Atwater v. Lago Vista*, 532 U.S. 318 (2001). There the Supreme Court held in a 5-4 decision that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. *Id.* at 323. The Court noted, however, that although the Constitution did not

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emphasis on citation release (as well as "stationhouse" release) was a logical extension of bail reform presumptions favoring pretrial release and release under least restrictive alternatives as well as encouraging diversion from the justice system altogether. Bail reform activists argued that unnecessary detention was intrusive and unnecessary to secure the person's appearance at court. Moreover, it strained the capacity of police lock-ups and jails.

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restrict such arrests, many jurisdictions have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses. *Id.* at 352. The Court also made clear that its ruling was not an endorsement of Atwater's arrest for a seat belt violation. Rather, in its view, state legislatures were the means to deal with the problem:

> It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle. It is, in fact, only natural that States should resort to this sort of legislative regulation, for, as Atwater's own *amici* emphasize, it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason. *Id.*

State supreme courts are also free to interpret their own constitutions differently, and the Ohio Supreme Court has rejected the *Atwater* rationale and construed the Ohio Constitution to prohibit warrantless arrests for minor misdemeanors in the absence of specified circumstances. See *State v. Brown*, 792 N.E.2d 175 (2003).

What was innovative in the 1960's had become a fairly widespread practice by the mid-1980s[26] and is fairly routinely practiced in many jurisdictions across the United States at the turn of the new century. This Third Edition Standard is consistent with previous editions in calling for use of citations to avoid unnecessary police custody when the requirements of prosecution and adjudication will be met without it.

There are several components to an effective citation release system that can help minimize the risk that a defendant may fail to appear in court on the return date specified in the citation. These include (1) accurate and reliable information about the background and living situation of the person whose release is being considered; (2) workable criteria for release or detention, with a presumption of release that is consistent with these Standards; (3) qualified decision-makers making the release decision (for example, trained police officers); (4) a short time period between the issuance of the citation and the date of the individual's scheduled court appearance as shown on the citation; and (5) the capacity for rapid follow-up in the event of non-appearance in court.[27]

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[26] *See* Debra Whitcomb *et al.*, *Citation Release* (Washington, D.C., National Institute of Justice, 1984).

[27] *Id.* at 43-50; also Mahoney *et al. supra* note 8 at 61-63.

Standard 10-2.2

Mandatory issuance of citation for minor offenses

(a) Except as provided in paragraph (c), a police officer who has grounds to arrest a person for a minor offense should be required to issue a citation in lieu of taking the accused to the police station or to court. In determining whether an offense is minor, the police officer should consider whether the alleged crime involved the use or threatened use of force or violence, possession of a weapon, or violation of a court order protecting the safety of persons or property.

(b) Except as provided in paragraph (c), when a person in custody has been taken to a police station and a decision has been made to charge the person with a minor offense, the responsible officer should be required to issue a citation in lieu of continued custody.

(c) The defendant may be detained when an otherwise lawful arrest or detention is necessary to ensure the safety of any person or the community or when the accused:

(i) is subject to lawful arrest and fails to identify himself or herself satisfactorily;

(ii) refuses to sign the citation after the officer explains to the accused that the citation does not constitute an admission

of guilt and represents only the accused's promise to appear;

(iii) has no ties to the jurisdiction reasonably sufficient to ensure the accused's appearance in court and there is a substantial likelihood that the accused will refuse to respond to a citation;

(iv) previously has failed to appear in response to a citation, summons, or other legal process for an offense;

(v) is not in compliance with release conditions in another case, is subject to a court order or is on probation or parole; or

(vi) poses a substantial likelihood of continuing thecriminal conduct if not arrested.

(d) When an officer fails to issue a citation for a minor offense, but instead takes a suspect into custody, the law enforcement agency should be required to indicate the reasons in writing.

(e) Notwithstanding the issuance of a citation, a law enforcement officer should be authorized to transport or arrange transportation for a cited person to an appropriate facility if the person appears mentally or physically unable to care for himself or herself.

History of the Standard

This Standard is based on Second Edition, Revised Standard 10-2.2. Subsection (a) substitutes the term "minor offense" for "misdemeanor" and provides guidance for determining whether an offense is minor. Safety concerns are given a new prominence in subsection (a) and in the introductory clause of subsection (b) that replaces former (c)(iii). Subsections (c)(v) and (vi) are new. Subsection (e) replaces Second Edition, Revised Standard 10-2.5.

Related Standard

ABA, Criminal Justice Standards, Mental Health (1986, 1989), 7-2.1; 7-2.3-2.6

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2003), 10-1.3

ABA, Criminal Justice Standards, Urban Police Function (2d ed. 1980), 1-1.1(b); 1-2.2(f); 1-3.4(b)

NAC, Corrections (1973), 4.3

NAC, Courts (1973), 4.2

NCCUSL, Uniform Rules of Criminal Procedure (1987), 211, 221

NDAA, National Prosecution Standards (1991), 45.2(b)

Commentary

Standard 10-2.2(a)

This Standard calls for policies requiring police officers to issue citations (rather than to arrest the offender) for minor offenses, except in circumstances

specified in subsection (c).[28] It parallels Standard 10-3.2 requiring judicial officers to employ summonses rather than arrest warrants for minor offenses.

The term "minor offense" is used rather than the term "misdemeanor" because, in many jurisdictions, "misdemeanors" encompass violent or potentially violent crimes that do not, under the Standard, require citation release. For example, domestic violence has been criminalized by statute in many jurisdictions and classified as a misdemeanor in some places. Until the early 1980's, police made relatively few arrests in these cases. Over the past several decades, however, a number of jurisdictions have adopted domestic violence "mandatory-arrest" policies. Since then, there has been an ongoing debate about the wisdom of such policies.[29] Standard 10-2.2 neither precludes nor mandates arrest in domestic violence cases.

Standard 10-2.2(b)

This Standard's prohibition against continued police custody of a person who is arrested and then charged with only a minor offense is a logical extension of the prohibition in subsection (a) against

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[28] *Cf.* Standard 10-1.3 and commentary, *supra* (defining minor offenses).

[29] For a discussion of the history and research about domestic violence mandatory arrest policies, *see* Joel Garner and Jeffrey Fagan, "Victims of Domestic Violence" in Robert C. Davis *et al.*, *Victims of Crime* (Thousand Oaks, CA: Sage Publications, Inc., 1997).

taking a person into police custody for a minor offense. Both reflect the principle that pretrial custody by police is generally unwarranted for minor offenses.

Standard 10-2.2(c)

This Standard recognizes that a bright-line rule prohibiting arrests for minor offenses is not appropriate, and that exceptions to the citation presumption sometimes are warranted. However, rather than allowing police officers broad discretion to determine when exceptions should be made, this Standard provides a narrow list of circumstances under which police officers may exercise discretion. It permits police to temporarily detain a person in police custody when necessary to ensure the safety of any person or the community. It also permits such temporary detention when individuals fail to identify themselves, refuse to sign the citation, do not show evidence of local ties that are reasonably likely to ensure response to the citation, or have previously failed to appear in court in response to a citation, summons, or other legal process. Moreover, custodial arrests are allowed when the individual is not in compliance with release conditions in another case, is subject to a court order, or is on probation or parole, or when the individual is involved in criminal activity that is likely to continue or to repeat itself.

The list of specific circumstances under which temporary detention in police custody (pending prompt initial appearance before a judicial officer as provided in Standard 10-4.1) is not mandatory.

Rather, it is permissive, leaving the decision whether to arrest or issue a citation in these situations to the discretion of the police officer.

Standard 10-2.2(d)

This Standard is aimed at ensuring accountability in adhering to the policy regarding use of citations for most minor offenses. It requires the law enforcement agency to state in writing the reasons for not issuing a citation any time an arrest is made for a minor offense. Written records provide a basis for subsequent review of citation practices to ascertain whether arrest exceptions are made on an appropriate and even-handed basis.

Standard 10-2.2(e)

This Standard distinguishes between the police officers' law enforcement function and community care-taking function.[30] It clarifies that a police

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[30] Courts generally distinguish between the police investigative function (apprehension of criminals) and the caretaking function (protecting the public and coming to the aid of those in distress). *See e.g.* Stanberry v. State, 684 A.2d 823 (Md. 1996) (citing State v. Carlson, 548 N.W.2d 138, 141 (Iowa 1996). As one federal appellate court commented, a police officer is "expected to aid those in distress; combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety." United States v. Rodriguez-Morales, 929 F.2d 780 at 784-85 (1st Cir. 1991). In Cady v. Dombrowski, 413 U.S. 433 (1973), the Supreme Court noted that police officers often "engage in what for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or

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decision to issue a citation to an individual who appears in need of mental or physical assistance does not preclude a decision to take or have the person taken to a care giving facility.

Standard 10-2.3
Regulations concerning citations

Each law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except when arrest or continued custody is necessary, the regulations should require such inquiry as is practicable into the accused's place and length of residence, family relationships, references, present and past employment, criminal record, and any other facts relevant to appearance in response to a citation.

History of the Standard

This Standard closely tracks subsection (b) of Second Edition, Revised Standard 10-2.3.

Related Standards

ABA, Criminal Justice Standards, Pretrial Release (3d ed. 2003), 10-1.3

ABA, Criminal Justice Standards, Urban Police Function (2d ed. 1980), 1-4.1; 1-4.2

NAC, Corrections (1973), 4.3

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acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441.

NAC, Courts (1973), 4.2

NCCUSL, Uniform Rules of Criminal Procedure (1987), 211; 221

NDAA, National Prosecution Standards (1991), 45.2(c)

Commentary

This Standard calls for law enforcement agencies to promulgate regulations on the use of citations that are consistent with other standards in this Part. The regulations should provide specific guidance to officers on when citations are mandatory and when arrest may be appropriate. They should assist the officer in determining whether or not release poses a danger. Finally, the regulations should require that whenever police issue citations, they should seek specific types of information relevant to the released individuals' likelihood of appearing in court in response to the citation.

Standard 10-2.4
Lawful searches

When an officer makes a lawful arrest, the defendant's subsequent release on citation should not affect the lawfulness of any search incident to the arrest.

History of the Standard

This Standard is unchanged.

Related Standards

NAC, Corrections (1973), 4.3

Commentary

The Fourth Amendment to the United States Constitution permits the police to perform warrantless searches of defendants incident to lawful arrest.[31] This Standard simply makes clear that there is no retroactive impact on the validity of such searches when the police subsequently determine that continued custody is not needed and accordingly release the defendant on citation.

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[31] *See e.g.*, Illinois v. Lafayette, 462 U.S. 640 (1983); United States v. Chadwick, 433 U.S. 1 (1977); Gustafson v. Florida, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973). Of course, even though the Fourth Amendment permits searches incident to arrests that do not result in the detention of the arrested person in a police or correctional facility, once a citation is issued the police officer has no authority to search unless a basis other than incident to arrest is apparent (e.g., plain view). *See* Knowles v. Iowa, 525 U.S. 113 (1998), in which the Supreme Court invalidated a search when a police officer issued a citation on the scene instead of making an arrest for a traffic infraction.